Re A Debtor (No. 21 of 1937) [1938] 2 All ER 824 but in that case the issue considered was one of nullity *ab initio* of the bankruptcy notice.

It is clear from the passage that there can be an application to set aside a bankruptcy notice on grounds other than those mentioned in the statutory provisions (for example, satisfaction of the judgment debt (see my previous reference to *Re A Debtor (No. 30 of 1956))* or illegallity) but such an application should be made by motion.

I think from the foregoing (see also *Re MSA Zachariah* [1993] 2 AMR 27) it is clear that at the hearing of the application to set aside the bankruptcy notice on an affidavit filed under r. 95(1), the SAR should have confined herself to a consideration of only the grounds which were within the ambit of s. 3(1)(i) of the Act and rr. 94(1)(b), 95 and Form 7 of the Rules, if any of the matters were raised and, if they were not, as in this case, she should not have gone behind the judgment on which the notice is founded to determine whether it was flawed or not.

In the circumstances, I reverse the order of the SAR allowing the application of the judgment debtor. Her order is set aside with costs.

As postscript, after I had delivered the above judgment, it was brought to my attention by Counsel for the judgment debtor that the Supreme Court in *Datuk Lim Kheng Kim v. Malayan Banking Berhad* [1993] 2 AMR 30 1285, has touched on the matter of an affidavit filed in that case which failed to disclose that the debtor had a counterclaim, set off or cross demand and that the Supreme Court held that the affidavit cannot operate as an application to set aside the bankruptcy notice within the contemplation of s. 3(1)(i) of the Act and the case should be treated as if no affidavit under r. 95 had in fact been filed.

PUBLIC PROSECUTOR

v.

LIM HONG CHIN

HIGH COURT, KUCHING
DATUK CHONG SIEW FAI J.
[CRIMINAL APPEAL NO. KG. 55 OF 1992 (I)]
4 SEPTEMBER 1993

CRIMINAL LAW & PROCEDURE: Section 294(i) of Criminal Procedure Code - 'Binding Over' order - Whether applicable to offences punishable with imprisonment or fine or with both.

The accused pleaded guilty to the charge of voluntarily assisting in the disposal of stolen property. After hearing the plea of mitigation the learned trial Magistrate made an order that the accused be bound over for a period of three years under the provisions of s. 294(i) of the Criminal Procedure Code (CPC).

The prosecution appealed against the order of the Magistrate contending that s. 294(i) of the CPC was not applicable having regard to the form of punishment provided for the offence charged in the Penal Code. The prosecution further contended that even if s. 294(i) of the CPC was applicable, it was wrongly resorted to having regard to the nature of the offence committed and by taking irrelevant factors into consideration.

Held:

[1] If the legislature had intended to confine the application of the said s. 294(i) of the CPC to offences punishable with imprisonment only without the option of any alternative penalty, it would have expressly so enacted by using some appropriate words to that effect or by simply adding the word "only" in the appropriate place in the said s. 294(i) of the CPC.

[2] In any event, this being a penal law, the benefit of doubt of any uncertainty should be given to the subjects on whom the penalty is to be enforced and the provisions should be so construed that those persons who are or might reasonably be within it should not be excluded from it.

[3] In all the circumstances of the case there was no good reason for interfering with the discretion exercised by the learned trial Magistrate.

[Appeal dismissed].

Cases referred to:
PP v. Loo Choon Fatt [1976] 2MLJ 256 ***(cit)***
PP v. Idris [1955] 21 MLJ 234 ***(cit)***
Raja Izzuddin Shah v. PP [1979] 1 MLJ 270 ***(refd)***
Teo Siew Peng & 4 Ors. v. PP [1985] 2 MLJ 125 ***(refd)***
Tan Khoon Eng v. PP [1992] 2 MLJ 132 ***(refd)***
PP v. Yeong Yin Choy [1976] 2 MLJ 267 ***(foll)***
PP v. Leonard Glenn Francis [1989] 1 CLJ 972 / [1989] 2 MLJ 158 ***(dist)***
PP v. Mohd Nor bin Mohd Som & Ors. [1985] SCR 172 SC ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 173A, 294(i)
Dangerous Drugs Ordinance 1952, s. 12(2)
Firearms (Increased Penalties) Act 1971, s. 8
Penal Code, ss. 298A, 414
Motor Vehicles (Driving Offences) Proclamation, s. 4(2)

For the appellant - Abdul Rahman b. Sebli, DPP
For the respondent - Sim Thong Poh; M/s. Sim Thong Poh

JUDGMENT

Chong Siew Fai J:
This is an appeal by the prosecution against the order of "binding over" of the accused with 2 sureties in the sum of RM5,000 to be of good behaviour for a period of 3 years. The order was made under s. 294 (i) of the Criminal Procedure Code.

The accused pleaded guilty to the charge of voluntarily assisting the disposal of certain articles knowing them to be stolen property, an offence under s. 414 of the Penal Code. After hearing the plea of mitigation by Counsel for the defence, the learned trial Magistrate ordered as stated above.

In this appeal the learned Deputy Public Prosecutor raised the availability of s. 294(i) of the Criminal Procedure Code having regard to the form of punishment provided for the offence in the Penal Code, and further contended that even if the said s. 294(i) was capable, in law, of being applied, it was wrongly resorted to having regard to the nature of the offence committed and by taking irrelevant factors into consideration.

In relation to the applicability of the said s. 294 (i), the issue raised was whether the discretion to invoke the subsection could be exercised in offences as the present one where they were punishable with imprisonment or fine or both. The learned Deputy Public Prosecutor contended that there was no discretion to invoke the said s. 294 (i) in the circumstances, citing *PP v. Loo Choon Fatt* [1976] 2 MLJ 256 and *PP v. Idris* [1955] 21 MLJ 234.

There appears to have been no Supreme Court decision on the point. A number of cases at the High Court level applied or approved the use of the said s. 29 (i) without dwelling upon the issue raised above, e.g. *Raja Izzuddin Shah v. PP* [1979] 1 MLJ 270; *Teo Siew Peng & 4 Ors. v. PP* [1985] 2 MLJ 125; *Tan Khoon Eng v. PP* [1992] 2 MLJ 132.

As to the 2 cases referred to by the learned Deputy Public Prosecutor:

(1) In *PP v. Idris* [1955] 2 MLJ 234 Thomas J. (as he then was) said (in my opinion, *obiter*) that s. 294 of the Criminal Procedure Code applied only to offences punishable with imprisonment without the option of a fine. I say *obiter* because there the offence involved (s. 4(2) of the Motor Vehicles (Driving Offences) Proclamation) was punishable with fine only and the observation of Thomas J. was made in the course of distinguishing s. 173A and 294 of the said Code.
(2) In *PP v. Loo Choon Fatt* [1976] 2 MLJ 256 Hashim Yeop A. Sani J. (as he then was) was of the opinion that s. 294 of the Criminal Procedure Code could not be applied to an offence under s. 12 (2) of the Dangerous Drugs Ordinance 1952 because of the alternative punishment of either a fine or imprisonment therein provided.

Holding the contrary view is the case of *PP v. Yeong Yin Choy* [1976] 2 MLJ 267. In that case the sole question referred for determination was whether s. 294 of the Criminal Procedure Code was applicable to an offence punishable with imprisonment with the option of a fine. Abdoolcader J. (as he then was) after discussing at length, concluded that the provisions of s. 294 were applicable in the case of a conviction for an offence punishable with imprisonment whether with or without the option of a fine or other alternative penalties.

After some anxious consideration and with the greatest respect, I tend to agree with *PP v. Yeong Yin Choy*, supra. If the legislature had intended to confine the application of the said s. 294(i) to offences punishable with imprisonment only without the option of any alternative penalty, it would have expressly so enacted by using some appropriate words to that effect or by simply adding the word "only" in the appropriate place in the said s. 294 (i). In any event, this being a penal law, the benefit of doubt of any uncertainty should be given to the subjects on whom

penalty is to be enforced, and the provisions should be so construed that those persons who are or might reasonably be within it should not be excluded from it.

Two more recent cases, may be mentioned:

(1) *PP v. Leonard Glenn Francis* [1989] 2 MLJ 158 and
(2) *PP v. Mohd. Nor bin Mohd. Som & Ors.* [1985] SCR 172 SC which was referred to by learned Counsel for the respondent.

(1) *PP v. Leonard Glenn Francis*, supra, was a case concerning s. 8 of the Firearms (Increased Penalties) Act 1971 which provides:

> Any person who is in unlawful possession of a firearm shall be punished with imprisonment for a term which may extend to fourteen years and with whipping with not less then six strokes.

And Edgar Joseph Jr. J. (as he then was) said:

> Once a conviction is recorded in respect of an offence under s. 8 of the Firearms (Increased Penalties) Act 1971, the provisions of s. 294 of the Criminal Procedure Code are overridden and the court must proceed to impose a sentence of imprisonment and whipping with not less than six strokes.

As may be seen from the above, the said s. 8 provides not only 2 mandatory forms of punishment i.e imprisonment sentence **and** whipping, but also that the whipping has to be not less than 6 strokes whereas the issue raised in our present appeal is whether s. 294(i) of the Criminal Procedure Code is exercisable in offences punishable with imprisonment with the option of a fine or with both imprisonment and fine. In other words, *PP v. Leonard Glenn Francis*, supra, dealt with a penal provision different from that raised by the issue in the present appeal. The case is therefore, to that extent, distinguishable. Also, *PP v. Yeong Yin Choy*, supra, it may be noted, was not considered in *PP v. Leonard Glenn Francis.*

(2) As regards the case of *PP v. Mohd. Nor bin Mohd. Som & Ors.* supra, (Supreme Court decision) although that case was not directly dealing with the issue raised in the instant appeal before me, it is some indication that s. 294 (i) of the Criminal Procedure Code may be properly invoked. That case involved s. 298A of the Penal Code which, at the material time, provided punishment of imprisonment for a term that might extend to 3 years, or with fine, or with both - similar form of wording as that in s. 414 of the said Code. The Supreme Court declined to interfere with the decision of the High Court imposing binding over orders under the said s. 294.

As regards the facts and circumstances of the present case under appeal, it is not disputed that the articles concerned formed no component part of a motor vehicle and that the role of the accused in the disposal took the form of purchase of the articles which the accused gave to his relatives as gifts.

In the grounds of judgment, the learned trial Magistrate gave various factors as to why she considered the case a proper one for resorting to s. 294 (i) of the Criminal Procedure Code. These included the remorse shown by the accused, his clean record, the plea of guilty, the motive for the purchase, co-operation with the police, public interest, and the unsuitability of custodial sentence on the facts and circumstances of the case. The learned trial Magistrate seemed to be of the opinion that given the opportunity, the accused was unlikely to commit an offence of a similar nature again. In any event, should the accused fail to observe the condition of the bond during the period of 3 years, he may be directed to appear in Court to receive judgment.

In all the circumstances, I do not consider that there is good reason for interfering with the discretion exercised by the learned trial Magistrate.

The appeal is dismissed.